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No. 98-85

In the Supreme Court of the United States

OCTOBER TERM, 1998

JAMES B. HUNT, JR., ET AL., APPELLANTS

v.

MARTIN CROMARTIE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

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QUESTIONS PRESENTED

1. Whether the State's evidence of a nonracial motive for the drawing of District 12 in the State's 1997 congressional redistricting plan was sufficient to preclude summary judgment for appellees on their challenge to District 12 under *Shaw* v. *Reno*.

2. Whether principles of res judicata preclude appellees from bringing the claims they assert in this suit.

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INTEREST OF THE UNITED STATES

This case concerns the standards a federal court should apply when determining whether a state election districting plan was drawn predominantly on the basis of race, in violation of the Equal Protection Clause of the Fourteenth Amendment. The United States enforces Sections 2 and 5 of the Voting Rights Act of 1965 (42 U.S.C. 1973, 1973c), which require, in part, that States and political subdivisions not engage in voting practices that deny citizens an equal opportunity to elect representatives of their choice on account of their race. Those statutes sometimes require States to take the racial consequences of their districting decisions into account. The United States has an interest in ensuring that States have reasonable leeway to design

districts that comply with both the Voting Rights Act and the Equal Protection Clause. The United States has participated in prior appeals in related litigation. The United States was a party-defendant in *Shaw* v. *Reno*, 509 U.S. 630 (1993), and filed a brief as *amicus curiae* in *Shaw* v. *Hunt*, 517 U.S. 899 (1996).

STATEMENT

Appellees challenged the First and Twelfth Districts in North Carolina's 1997 congressional redistricting plan, which was enacted as a remedy for the plan this Court held unconstitutional in *Shaw* v. *Hunt*, 517 U.S. 899 (1996) (*Shaw II*). Appellees alleged that the challenged districts were drawn in violation of the Equal Protection Clause. The district court granted summary judgment to appellees with regard to the Twelfth District, holding that undisputed facts demonstrated that "the General Assembly utilized race as the predominant factor in drawing the District." J.S. App. 22a.

1. a. In *Shaw II*, this Court struck down North Carolina's 1992 congressional districting plan under the equal protection clause of the Fourteenth Amendment. The Court held that District 12 in that plan was drawn predominantly on the basis of race, 517 U.S. at 907, and that it did not satisfy strict scrutiny, because the record did not show a compelling interest in remedying past discrimination or complying with Sections 2 and 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973 and 1973c. 517 U.S. at 910-918. The *Shaw* plaintiffs had also attacked District 1 of the 1992 plan. This Court held, however, that it lacked jurisdiction to address the constitutionality of District 1, because none of the plaintiffs resided in that district. *Id.* at 904.

b. On July 3, 1996, a few weeks after *Shaw II* was decided, three residents of District 1 in the 1992 plan—

Martin Cromartie, Thomas Chandler Muse, and another plaintiff who has since dismissed her claim—filed this action, alleging that District 1 of the 1992 plan was also a racial gerrymander. J.S. App. 3a. The district court stayed this case pending the outcome of the remand proceedings in *Shaw*. On July 9, 1996, Cromartie, Muse, and the third plaintiff also joined the plaintiffs in *Shaw* on remand and filed an amended complaint in that case also challenging District 1. *Ibid.*

c. The district court in *Shaw* afforded the North Carolina General Assembly the opportunity to enact a plan that was constitutional, and the Assembly established Senate and House redistricting committees to complete the task. In North Carolina, the Senate has a Democratic majority and the House has a Republican majority. State Senator Roy A. Cooper, III, and State Representative W. Edwin McMahan, the chairmen of the Senate and House redistricting committees, have provided affidavits detailing the goals and purposes of the committees. J.S. App. 69a-78a (Cooper); *id.* at 79a-84a (McMahan). Both explain that their respective committees shared the same goals: to "cure the defects in the old plan and at the same time preserve the existing partisan balance (6 Republicans and 6 Democrats) in the State's congressional delegation." *Id.* at 81a (McMahan); see also *id.* at 71a-72a (Cooper). Cooper and McMahan's committees worked together to achieve those goals. *Id.* at 72a, 81a.

In order to cure the constitutional defects of the old plan, emphasis was placed upon the following districting criteria: "(1) avoidance of division of precincts; (2) avoidance of the division of counties when reasonably possible; (3) functional compactness (grouping together citizens of like interests and needs); (4) avoidance of long narrow corridors connecting concentrations of

minority citizens; and (5) ease of communication among voters and their representatives." J.S. App. 72a; see also *id.* at 81a. In designing the plan to maintain the partisan balance in the State's congressional delegation, State Senator Cooper explained that "election results were the principal factor which determined the location and configuration of all districts in [the plan] so that a partisan balance which could pass the General Assembly could be achieved." *Id.* at 73a. Representative McMahan also stated that "[t]he means I used to check on the partisan nature of proposed new districts was the election results in the General Assembly's computer data base" and "more recent election results." *Id.* at 81a-82a. Both legislators acknowledged that, in the development of the plan as a whole, "[r]acial fairness was considered," because of the legislators' "[o]bligations to represent all of our constituents of all races and to comply with the Voting Rights Act." *Id.* at 77a, 83a. But both attested that "partisan election data, not race, was the predominant basis for assigning precincts to districts including precincts in Districts 1 and 12." *Id.* at 77a; see also *id.* at 83a.

The 1997 plan overall divides two of 2,531 precincts (J.S. App. 72a, 117a) and 22 of the State's 100 counties. *Id.* at 72a, 116a. All of its districts are contiguous, and the plan does not employ artificial devices such as "cross-overs" and "double cross-overs" to achieve contiguity.[1] *Id.* at 72a, 114a. District 12, in particular, has

[1] A "point contiguity," which we understand to be the same as a "cross-over," occurs "when the political or census block boundaries that are being used to define the boundaries [of a district] happen to touch only at a single 'point.'" *Shaw* v. *Hunt*, 861 F. Supp. 468, 468 (E.D.N.C. 1994), rev'd on other grounds, 517 U.S. 899 (1996). A "double cross-over" is "a point of contiguity that allows two districts essentially to cross over each other," creating an "X"-shaped pattern on a map. *Id.* at 468.

the following features: (1) it divides one precinct ("a precinct in Mecklenburg County that was divided in every local districting plan," *id.* at 74a); (2) its length, as compared with the corresponding District 12 in the unconstitutional 1992 plan, was reduced by 46% from 191 miles to 102 miles; (3) the number of counties in the district was reduced from 10 to 6; (4) all cross-overs, double cross-overs and points of contiguity were eliminated; and (5) its geographic scope was limited to the citizens in Charlotte and the cities of the Piedmont Urban Triad.[2] *Ibid.*

As a result of the efforts to make District 12 a strong Democratic district, 75% of the district's registered voters are Democrats and at least 62% of the voters residing in the district voted for the Democratic candidate in the 1990 United States Senate election, the 1988 Lieutenant Governor election, and the 1988 election for one seat on the court of appeals. J.S. App. 99a. District 12 is not a majority-minority district. African-Americans comprise 43% of the voting age population, 46% of the registered voters in the district, and 47% of the total population of the district. J.S. App. 6a & n.2. Twelve of the 17 African-American members of North Carolina's House of Representatives voted against the 1997 plan. *Id.* at 83a.

The plan was enacted by the legislature on March 31, 1997, despite an earlier belief by many that the party division between the two houses of the legislature would make enactment of a plan impossible. J.S. App. 71a, 76a, 80a, 82a. On June 9, 1997, the Department of

[2] The Piedmont Urban Triad apparently consists of the neighboring cities of Winston-Salem, High Point, and Greensboro.

Justice precleared the plan pursuant to Section 5 of the Voting Rights Act. *Id.* at 162a.

2. On September 12, 1997, the three-judge panel on remand from this Court in *Shaw* approved the 1997 plan. J.S. App. 157a-168a. With respect to District 12 in the new plan, the *Shaw* plaintiffs, relying on this Court's decision in *United States* v. *Hays*, 515 U.S. 737 (1995), asserted that they did not live within the district's boundaries and therefore disclaimed standing to challenge the district. See J.S. App. 163a. The *Shaw* court, while "doubtful" that they lacked standing, *id.* at 166a, concluded that it would approve the plan as an adequate remedy "on the simple basis that its adequacy * * * has not been challenged by any party to the litigation." *Ibid.* The court noted, however, that its approval of the plan "does not—cannot—run beyond the plan's remedial adequacy with respect to [the parties before the court] and the equal protection violation found as to former District 12." *Id.* at 167a.

3. On October 17, 1997, the district court in this case dissolved its stay, permitting the litigation to proceed. See J.S. App. 4a. That same day, two of the original three plaintiffs in this case—Cromartie and Muse—and four residents of District 12—Everett, Froehlich, Linville, and Hardaway—filed an amended complaint seeking a declaratory judgment that both Districts 1 and 12 of the 1997 redistricting plan are unconstitutional racial gerrymanders. *Ibid.* Plaintiffs moved for a preliminary injunction on January 30, 1998, and for summary judgment on February 5, 1998. *Ibid.* The State opposed those motions and filed its own motion for summary judgment. *Id.* at 4a-5a.

On April 3, 1998, the three-judge court entered a summary order in which it granted the plaintiffs' motion for summary judgment that District 12 was unconstitutional and enjoined the State from holding any elections under the 1997 congressional plan. J.S. App. 45a-46a. The court denied the plaintiffs' motion as to District 1. *Id.* at 22a-23a. On April 6, the State noticed its appeal from the order and filed an emergency application in this Court for a stay of the order pending appeal. *Id.* at 47a. On April 13, 1998, before the district court had issued its memorandum opinion, this Court denied the stay application, with Justices Stevens, Ginsburg, and Breyer dissenting. 118 S. Ct. 1510.

On April 14, 1998, the district court issued a memorandum opinion in support of its summary judgment order. J.S. App. 1a-44a. The court rejected North Carolina's argument that District 12 was "designed with politics and partisanship, not race, in mind." *Id.* at 20a. The court did not discuss the State's evidence—presented in affidavits by legislators and an expert statistical analysis—that the predominant motive for the configuration of District 12 was not race, but a desire to create a solidly Democratic district as measured by the results of past elections. Relying instead on appellees' evidence regarding party registration, the court stated that, "[a]s the uncontroverted material facts demonstrate, * * * the legislators excluded many heavily-Democratic precincts from District 12, even though those precincts immediately border the District." *Ibid.* The court also noted that the counties and cities that are split by District 12 generally contain substantially greater proportions of African-Americans within the district boundaries than are left outside of them. *Ibid.* The court also found that "objective measures of the compactness of District 12 reveal that it is still the most geographically scattered of North Carolina's congressional districts." *Ibid.*; see also *id.* at 9a-11a.

Judge Ervin dissented. J.S. App. 25a-44a. He concluded that the plaintiffs were not entitled to summary judgment because there was no direct evidence to contradict the state legislators' proffered non-racial justifications. *Id.* at 29a. He noted that there are significant differences between District 12 and the districts held unconstitutional in *Bush* v. *Vera*, 517 U.S. 952 (1996), *Shaw II*, and *Miller* v. *Johnson*, 515 U.S. 900 (1995). J.S. App. 29a. As he pointed out, "North Carolina's twelfth congressional district is not a majority-minority district, it was not created as a result of strong-arming by the U.S. Department of Justice, and, contrary to the majority's assertions, it is not so bizarre or unusual in shape that it cannot be explained by factors other than race." *Id.* at 25a.

Judge Ervin also found the statistical evidence presented by Dr. Peterson, the State's expert, more persuasive than the plaintiffs' evidence, because Dr. Peterson examined the entire circumference of District 12, "looking at both the party affiliation and racial composition of the precincts on either side of the district line," whereas the plaintiffs merely picked certain examples on District 12's boundary in which the legislature had included precincts with large African-American populations. J.S. App. 34a-35a. Judge Ervin also argued that "the majority's decision to look only at the percentage of registered Democrats in analyzing the district's borders ignores the fact that registered Democrats are not compelled to vote for Democratic candidates and often do not." *Id.* at 37a. He referred instead both to direct evidence from legislators and circumstantial evidence provided by Dr. Peterson's study that the legislature had relied on "the history of recent voting patterns in an attempt to design the

districts to ensure that the partisan balance would remain stable." *Id.* at 38a.

SUMMARY OF ARGUMENT

The district court granted summary judgment to appellees, based on evidence that District 12 was less regular in shape than other districts in North Carolina and that District 12 had a substantially larger African-American population than surrounding districts, dividing various counties and cities in a way that correlated with race. The court rejected the State's explanation that the predominant motive for District 12's configuration was not race, but politics, on the ground that the district failed to include a number of adjoining, largely white precincts with large percentages of registered Democrats.

The record was inadequate to support appellees' summary judgment motion. In determining whether strict scrutiny applies to a district challenged under *Shaw* v. *Reno*, the ultimate inquiry is whether race was the predominant motive underlying the challenged district, such that traditional districting principles were subordinated to race. Evidence of a coincidence of irregular borders with a large African-American population is in some circumstances sufficient to support an inference that a legislature's predominant motive was race, although that inference is weakened when, as here, the district is not a majority-minority district. But such circumstantial evidence is surely insufficient to support summary judgment where the State has offered an alternative, non-racial explanation for the district's configuration. In this case, the State did so, when it offered evidence that the predominant motive for the district's configuration was to create a solidly Democratic district based on past voting patterns, as

part of an overall plan to achieve partisan balance in the State's districting. The State supported that explanation with direct evidence, in the form of affidavits of those who drew the plan, and indirect evidence, in the form of a detailed expert study of the district's lines by Dr. Peterson. That was more than ample to create a genuine issue of material fact as to whether race or the achievement of a particular partisan result was the State's predominant motive in configuring the district as it did. The district court therefore erred in granting summary judgment to appellees.

The primary evidence upon which the district court relied to reject the State's partisan explanation for District 12's configuration was that District 12 fails to include some neighboring, majority-white precincts with majorities of voters registered as Democrats. The district court's reliance on that evidence was mistaken. First, the State never purported to rely on *registration* figures to achieve its partisan goals; rather, the State's direct and circumstantial evidence was that it drew District 12 based on *actual past election results*. Accordingly, any lack of correlation between District 12's boundaries and areas with high Democratic registration would be of minimal significance. Second, in light of the complexities of redistricting and the multiple goals a state legislature necessarily pursues, selective examples of a relatively small number of precincts that were not included in the district could not be sufficient—either generally or on the record in this case—to refute a State's convincing evidence that the district as a whole was drawn for partisan purposes. Accordingly, the district court erred in granting summary judgment to appellees.

The State also has argued that appellees' claims in this case are in any event barred by the results of the

earlier *Shaw* litigation. Four of the appellees in this case, however, were not parties in *Shaw*. The record evidence to show that those four plaintiffs were barred —primarily that they were represented by the same attorney and advanced a similar claim—is insufficient to support application of claim preclusion doctrines against them.

ARGUMENT

THE DISTRICT COURT'S SUMMARY JUDGMENT ORDER WAS BASED UPON ITS FAILURE TO FOLLOW PRINCIPLES THIS COURT HELD MUST BE APPLIED WHEN DETERMINING WHETHER AN ELECTION DISTRICT CONSTITUTES A RACIAL GERRYMANDER.

A. Where The Defendant In A *Shaw* Case Offers A Non-racial Explanation For A District's Configuration, The Mere Coincidence Of The District's Lines With Racial Demographics Is Insufficient To Warrant Summary Judgment For The Plaintiff

1. This case is before the Court on the district court's grant of summary judgment to appellees. Because a grant of summary judgment is a legal, not a factual, determination, an appellate court must review a grant of summary judgment *de novo*. See *Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, 504 U.S. 451, 465 n.10 (1992). The district court was justified in granting summary judgment only if there was no genuine issue of fact that is material to the cause of action. See *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 324 (1986); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Where, as here, the non-movant produces evidence in opposition to the motion for summary judgment, that evidence "is to be believed, and all

justifiable inferences are to be drawn in [the nonmovant's] favor." *Id.* at 255. The applicable substantive law determines which facts are material. *Anderson*, 477 U.S. at 248.

2. In this case, the constitutionality of District 12 turns on whether it is subject to strict scrutiny under the Equal Protection Clause, since the question whether the district was narrowly tailored to achieve a compelling state interest was not litigated by the parties or decided by the district court. The applicable substantive law on that point is provided by this Court's decisions in *Shaw* v. *Reno*, 509 U.S. 630 (*Shaw I*), and the cases that have followed it. In *Shaw I*, the Court held that strict scrutiny applies if "redistricting legislation * * * is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles." *Id.* at 642. In *Miller* v. *Johnson*, 515 U.S. 900 (1995), the Court clarified that the application of strict scrutiny in a *Shaw* case does not necessarily depend on examination of a map; although shape and racial demographics may provide "circumstantial evidence," strict scrutiny applies only if "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale." *Id.* at 913. Strict scrutiny does not apply unless the plaintiff shows, either through direct evidence of legislative motive or through indirect evidence of shape and demographics, that "the legislature subordinated traditional race-neutral districting principles * * * to racial considerations." *Id.* at 916.

Since the inquiry in this case turns on the legislature's predominant motive, a plan would not be subject to strict scrutiny merely because the legislature that

enacted it was aware of the racial demographics of the plan, or even because race was one of the legislature's motives in crafting the district. See *Bush* v. *Vera*, 517 U.S. 952, 958 (1996) (plurality opinion) (strict scrutiny not triggered merely because "redistricting is performed with consciousness of race" or because the plan is the result of the "intentional creation of majority-minority districts"). Nor does the correlation of a district's lines with race necessarily render the district constitutionally suspect. *Id.* at 968. If a State offers legitimate explanations other than race for a district's configuration, a court must carefully examine the proffered explanations to determine whether the "race-neutral, traditional districting considerations predominated over racial ones." *Id.* at 964; see also *Shaw II*, 517 U.S. 899, 905 (1996) ("The Constitutional wrong occurs when race becomes the 'dominant and controlling' consideration.").

In this case, the State acknowledged that the legislators who drew District 12 considered race in analyzing the district's configuration. See J.S. App. 77a (affidavit of Sen. Cooper), 83a (affidavit of Rep. McMahan). But the State offered both direct and circumstantial evidence that the *predominant* motive of the legislators was not race, but rather to give District 12 a solidly Democratic character, so that the desired partisan balance could be achieved in the State's congressional delegation as a whole. Cf. *Gaffney* v. *Cummings*, 412 U.S. 735, 752 n.18 (1973). The plurality in *Bush* articulated the principles that govern such a case. "If the State's goal is otherwise constitutional political gerrymandering, it is free to use * * * precinct general election voting patterns, precinct primary voting patterns, and legislators' experience * * * to achieve that goal regardless of its awareness of its racial

implications." 517 U.S. at 968. Indeed, "[i]f district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify." *Id.* at 968. Only if the evidence demonstrates "that racially motivated gerrymandering had a qualitatively greater influence on the drawing of district lines than politically motivated gerrymandering" or that "political gerrymandering was accomplished in large part by the use of race as a proxy" is a district subject to strict scrutiny. *Id.* at 969.

B. Because The State Offered Ample Evidence That Achieving A Partisan Objective—Not Race—Was The Predominant Motive In Drawing District 12, The District Court Erred In Ruling That Appellees Were Entitled to Judgment As A Matter Of Law

1. In this case, appellees presented, and the district court relied upon, circumstantial evidence showing that: (1) District 12's boundary tends to split towns and counties such that areas with 40% or greater African-American population are included in the district, see J.S. App. 9a-10a, 20a; (2) District 12 does not include some abutting precincts with Democratic registrations in excess of 50% and African-American populations less than 35%, see *id.* at 8a-9a, 20a; (3) District 12 is irregular in shape and, based on some objective measures of geographical compactness, it is the least compact district in North Carolina's 1997 plan and less compact than some other challenged districts in other States, see *id.* at 9a-11a, 20a-21a; and (4) District 12 connects communities that have not been joined in a congressional district in recent years, other than in the 1992 plan, see *id.* at 19a.

2. Those facts raise an inference that race was a factor in drawing the district. See *Miller*, 515 U.S. at 913. Even at this stage of the analysis, however, it is significant that District 12—with a 43% African-American voting age population and a 47% total African-American population—is not a majority-minority district. The harms caused by a *Shaw* violation—that it "reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole," *Shaw I*, 509 U.S. at 650 —are far less likely to occur in non-majority-minority districts. As the Court explained in *Lawyer* v. *Department of Justice*, 117 S. Ct. 2186 (1997), "the fact that [the challenged district] is not a majority black district * * * supports the * * * finding that the district is not a 'safe' one for black-preferred candidates, but one that offers to any candidate, without regard to race, the opportunity to seek and be elected to office." *Id.* at 2195 (internal quotation marks omitted). Because this fact makes appellees' proffered inference of predominant racial motive significantly less plausible, it increases appellees' burden at the summary judgment stage. Cf. *Anderson*, 477 U.S. at 249; see also *Miller*, 515 U.S. at 916-917 ("[C]ourts must * * * recognize * * * the intrusive potential of judicial intervention into the legislative realm, when assessing under the Federal Rules of Civil Procedure the adequacy of a plaintiff's showing at the various stages of litigation."). Indeed, there is a risk that an overly aggressive application of *Shaw* to non-majority-minority districts could have harmful consequences that are the reverse of those discussed by the *Shaw* Court, for it could send an unwarranted message that legislators must affirma-

tively avoid placing concentrations of minority group members together in a district.

Assuming, however, that appellees' evidence was sufficient to raise an inference of predominant racial motive, that inference was countered by the State. The State filed affidavits containing substantial evidence that a desire to achieve certain partisan political outcomes—not race—was the predominant motive underlying the configuration of District 12. Cf. *Bush*, 517 U.S. at 964; *Gaffney*, 412 U.S. at 751-754. That evidence consisted of both direct evidence of the legislature's motives in drawing the district, and circumstantial, demographic evidence regarding the constitution of the district as drawn.

a. The direct evidence consisted of affidavits in which the two legislators who were responsible for the plan—Senator Cooper, the Chairman of the Senate Redistricting Committee, and Representative McMahan, the Chairman of the House Redistricting Committee—explained how it was drawn. Senator Cooper stated that, because "[r]edistricting generally is a task which becomes extremely partisan," there was only a "single path by which a compromise [between the Democratic-controlled Senate and the Republican-controlled House] might be reached and a new plan adopted." J.S. App. 71a. That was to "cure the defects in the old plan and at the same time preserve the existing partisan balance in the State's congressional delegation." *Ibid.*; see also *id.* at 81a (Rep. McMahan).

To cure the constitutional defects in the prior plan, Senator Cooper stated that he intended to avoid dividing precincts or counties where possible, to "group[] together citizens of like interests and needs," to avoid "long narrow corridors connecting concentrations of minority citizens," and to draw districts in

which there would be "ease of communication among voters and their representatives." J.S. App. 72a; see also *id.* at 81a (Rep. McMahan). He stated unequivocally, however, that "election results were the *principal factor* which determined the location and configuration of all districts" in the Senate's preliminary plan, entitled Plan A. *Id.* at 73a (emphasis added); see also *id.* at 81a-82a.[3] Senator Cooper stated that Plan A was then modified to avoid placing various incumbents in districts with each other, to strengthen the Democratic support in the two districts that were substantially reconfigured because they had been challenged in *Shaw*, and to address other partisan concerns presented by a similar plan that the House had adopted. *Id.* at 75a, 76a-77a; see also *id.* at 82a (Rep. McMahan).

Senator Cooper acknowledged that he was aware of race in devising the plan. He stated that what he termed "[r]acial fairness" was "considered in the development of the plan." J.S. App. 77a; see also *id.* at 83a (Rep. McMahan).[4] He added, however, that "race for

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[3] The House and Senate apparently used somewhat different sets of election results. Representative McMahan stated that "[t]he means I used to check on the partisan nature of proposed new districts was the election results in the General Assembly's computer data base (the 1990 Helms-Gantt election and the 1988 elections for Lieutenant Governor and one of the Court of Appeals seats)." J.S. App. 81a-82a. Senator Cooper stated that his "tool[s]" were "election results gathered and analyzed by the National Committee for an Effective Congress (NCEC)," which were "based on the results of a series of elections from 1990 to 1996," and "older election results contained in the legislative computer data base." *Id.* at 73a. Neither Senator Cooper nor Representative McMahan stated that he relied on voter registration data.

[4] Senator Cooper and Representative McMahan explicated "racial fairness" in terms of their responsibilities to "represent all of our constituents of all races and to comply with the Voting

the sake of race was not the dominant or controlling factor in the development or enactment of the plan." *Id.* at 77a; see also *id.* at 83a (Rep. McMahan). He stated that the fact "[t]hat a large proportion of precincts assigned to District 12 have significant black populations is simply the result of a strong Democratic voting pattern among blacks." *Id.* at 77a. "In drawing initially Congressional Plan A and in negotiating the eventually enacted plan, partisan election data, not race, was the *predominant* basis for assigning precincts to districts including precincts in Districts 1 and 12." *Ibid.* (emphasis added); see also *id.* at 83a (Rep. McMahan) ("dominant and controlling factors" were "curing the constitutional defects in the prior plan" and "protecting the existing partisan balance").[5] The evidence showed that District 12 in fact had a 62% to 75% Democratic population, depending on the measure used. See *id.* at 99a.

The affidavits of Senator Cooper and Representative McMahan directly support the State's contention that the configuration of District 12 was primarily the result of partisan motives, not race, and that the correlation between the district boundaries and race was the result of "a strong Democratic voting pattern among blacks." J.S. App. 77a. The affidavits also make clear that the State achieved its partisan objectives by relying on statistics regarding actual past elections—not voter

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Rights Act," J.S. App. 77a, 83a—a goal that obviously comprehends the principles this Court announced in *Shaw* and its progeny, as well as the principles underlying the Voting Rights Act.

[5] As evidence that race was not the controlling factor, Representative McMahan referred to "the fact that 12 of the 17 members of the House who are black voted against [the plan]." J.S. App. 83a.

registration figures. That choice was, of course, reasonable, particularly in a State in which Democratic registration consistently overstates actual Democratic voting strength in elections.[6]

b. The State also offered circumstantial evidence that corroborated the undisputed direct evidence that partisan politics—not race—was the predominant factor in drawing District 12. The State filed an affidavit by Dr. David W. Peterson, an expert statistician, who was asked "to determine whether, based on the statistical pattern of association relating the boundary of the Twelfth District and the racial and political makeup of nearby residents, race appears to have been the predominant factor in defining that boundary." J.S. App. 86a. Dr. Peterson used the results of three recent elections, as well as party registration figures, to determine political affiliation on a precinct-by-precinct basis in the district. See *id.* at 89a.

Dr. Peterson concluded both that there is a "tendency * * * to include precincts within the District which have relatively high Democratic party representation" and that there is a "tendency * * * to include precincts within the District which have relatively high black representation." J.S. App. 87a. The

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[6] For example, in 1996, 54% of the State's voters were registered as Democrats, while only 34% were Republicans. Michael Barone, *et al.*, *The Almanac of American Politics 1998*, at 1056 (1997). Yet the Republican candidates won in the 1992 and 1996 presidential elections, the State's two Senators are both Republicans (although a Democrat defeated one of them in the 1998 election), and the State's delegation to the 105th Congress consisted of six Republicans and six Democrats. *Id.* at 1057. In the November 1998 election, the Republicans gained a seat in North Carolina, and the delegation to the 106th Congress will therefore consist of seven Republicans and five Democrats.

coexistence of those two tendencies is explained because there is also "a substantial correlation * * * between the fraction of a precinct's residents who are black and the fraction who favor the Democratic political party over the Republican." *Id.* at 88a. Ultimately, however, Dr. Peterson concluded that "there is no statistical indication that race was the predominant factor determining the border of the Twelfth District" because "there is at least one other explanation that fits the data as well as or better than race, and that explanation is political identification." *Id.* at 87a. Based on Dr. Peterson's analysis of those border precincts where the correlation [between blacks and Democrats] does not exist, he stated that the "boundary of the Twelfth District appears to have been drawn at least as much with the purpose of creating a Democratic majority within the District as with creating a black majority." *Id.* at 88a.[7] Indeed, he noted that, while the proportion

[7] Dr. Peterson's analysis proceeded by isolating 234 segments along the 12th District's boundary that each separated one inside precinct from one outside precinct. He analyzed the racial and political composition of these inside and outside precincts based on a variety of different measures of racial demographics (total population, voting age population, registered voters) and a variety of different measures of party affiliation (election results from three past elections and party registration). Regardless of which measures were used, it turned out that, for many of the segments of the district boundary, the precinct inside the district had a greater proportion of African-Americans *and* a greater proportion of Democrats than the precinct outside the district. He focused, however, on the segments of the district boundary in which that was not true—*i.e.*, in which the district boundary ran between a precinct that contained a higher proportion of African-Americans and a lower proportion of Democrats than the precinct on the other side of the line. Under his approach, the legislature's primary motivation would be tested by whether the legislative tended to include in District 12 the precinct with the larger proportion of African-Americans or the precinct with the larger proportion of Democrats. He found that the legislature chose the latter much more often than the former, leading him to conclude that "the statistical support for the Political Hypothesis is at least as strong as that for the Race Hypothesis, and, indeed, somewhat stronger." J.S. App. 98a. See also *id.* at 99a (reaching same conclusion based on a narrower sample of precincts).

of African-Americans in District 12 ranges from 43% to 47% (depending on whether total population, voting age population, or registered voters are considered), the proportion of Democrats ranges from 62% to 75% (depending on which election results were used). *Id.* at 99a. He explained that "[t]hese figures support the proposition that creation of a Democratic majority in District Twelve was a more important consideration in its construction than was the creation of a black majority." *Ibid.*

3. The consistent direct and circumstantial evidence presented by the State that partisan considerations—not race—was the predominant motive in shaping District 12 demonstrated that, with respect to the ultimate question in the case, there was at the very least a substantial factual dispute. As *Bush* teaches, "[i]f district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify." 517 U.S. at 968. The State had explained appellees' evidence of the correlation between race and District 12's lines by showing that the predominant motive in drawing those lines was political affiliation, which itself had a correlation with race. Unless some other evidence in the record conclusively rebutted the State's direct and indirect evidence of a predominant political motive, the record simply could not support—much less

conclusively demonstrate as a matter of law—the district court's conclusion that the predominant motive underlying District 12 was race.

There was no such rebuttal evidence in the record. Appellees offered *no* direct evidence of motive. They did not, for example, offer evidence that the State's computers contained racial data at a "uniquely detailed" level that the legislature used "to make more intricate refinements on the basis of race than on the basis of other demographic information," as in *Bush*, 517 U.S. at 961, or evidence that the State legislature had an "overriding desire to comply" with Department of Justice pressure to create a certain number of majority-minority districts, as in *Miller*, 515 U.S. at 918. With regard to the State's circumstantial evidence contained in the Peterson affidavit, the district court acknowledged the State's claim that "political identification was the predominant factor determining the border of District 12." J.S. App. 20a. But the court rejected that claim on the ground that "the legislators excluded many heavily-Democratic precincts from District 12, even though those precincts immediately border the District." *Ibid.* The court also relied on the fact that District 12 is "the most geographically scattered of North Carolina's congressional districts" and that the legislature "disregarded * * * compactness in drawing District 12." *Id.* at 20a, 21a-22a.[8] Neither of the grounds

[8] The district court also appeared to believe that District 12 "disregarded * * * contiguity * * * [and] community of interest." J.S. App. 21a-22a. Senator Cooper stated that one of the State's express goals was achieving contiguity without the need for artificial "devices" like "cross-overs," "double cross-overs," and "points of contiguity." *Id.* at 72a. The district court did not explain any respect in which District 12 failed to achieve that goal, and we are aware of none. With respect to "community of interest," the State submitted evidence that the district joins together communities of Democratic voters in the urban cities of Charlotte, Greensboro and Winston-Salem. *Id.* at 63a-64a, 75a. The district court, which was obligated to draw all inferences in favor of the State on appellee's motion for summary judgment, had no basis to reject that evidence or to conclude that the communities of interest to which the State referred were in some way illegitimate. Certainly, the fact that these communities had not been joined in the past, see *id.* at 19a, could not disable the State from determining that a community of interest had now developed that was entitled to recognition. Cf. *Bush*, 517 U.S. at 966.

on which the district court relied addressed—much less refuted—the State's evidence that a desire to achieve a partisan political result was the predominant motive in drawing District 12.

a. The district court placed primary reliance on a listing of 32 precincts that abutted—but were not included in—District 12 and that had a relatively low African-American population (less than 35%) and a relatively high Democratic registration percentage (between 54% and 76%, with the overwhelming majority being between 55% and 60%). J.S. App. 8a. That evidence, however, was insufficient even to cast doubt on the State's evidence that partisan political considerations were the predominant motive in drawing District 12. The State had never purported to rely on party registration figures in drawing District 12; to the contrary, Senator Cooper and Representative McMahan were unequivocal that they had used actual election results to achieve the partisan balance that was the basis of the districting plan. See *id.* at 73a, 76a, 77a, 81a-82a. Dr. Peterson's analysis also primarily relied on actual election results in concluding that a partisan objective, rather than race, was the predominant factor explaining the configuration of District 12. *Id.* at 90a-

91a. Thus, even if the evidence relied on by the district court demonstrated conclusively that District 12's boundaries did not correlate with party registration figures, the State's evidence that partisan affiliation, as measured by actual election results, was the predominant motive would remain entirely unrebutted.

There is an additional flaw in the district court's reasoning. This Court has explained that "courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus." *Miller*, 515 U.S. at 915-916. Indeed, in this very case, the State articulated a number of distinct goals it was trying to achieve in the redistricting legislation at issue, not merely the various partisan objectives (maintaining the overall partisan balance in the State's congressional delegation, avoiding contests pitting incumbents against each other, keeping each incumbent in his own district), but also maintaining population equality and advancing a variety of other objectives (avoiding precinct and county splits where possible, respecting communities of interest, facilitating ease of communication among voters and their representatives). In light of the sometimes complex interplay of these goals and the strictures of the one-person/one-vote rule, there will be few districts in which *every* line-drawing decision is explicable by reference to a single goal. Thus, even had the district court relied on actual election results rather than party registration, the fact that a relatively small number of Democratic precincts were excluded from District 12 would not in itself refute the State's contention that drawing a Democratic district was its

primary goal.[9] Before rejecting the State's evidence that politics, not race, drove the creation of District 12, a far more discerning inquiry must be undertaken, in which the district's configuration as a whole is carefully compared with the justifications offered.

b. The district court also relied on the fact that District 12 scored lower than did other North Carolina districts on two measures of compactness. J.S. App. 21a-22a. Those facts, however, could not result in a grant of summary judgment to appellees. In this respect, *Bush* is once again instructive.

The plurality in *Bush* accepted the district court's finding in that case that the Texas districts it was examining "have no integrity in terms of traditional, neutral redistricting criteria." 517 U.S. at 960. Indeed,

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[9] In this case, for example, an examination of appellee's Exhibits M, O, and P, on which the district court based its analysis, reveals easy explanations for the alleged "exclusion" of most of the precincts with high Democratic registration percentages—even assuming that Democratic registration percentages were relevant in this case. Most of the "excluded" precincts have Democratic registration percentages of 55-60%, but border on precincts in District 12 that have much higher Democratic registration percentages, often 80-90% or above. Only one of the "excluded" precincts has a Democratic registration (76%, see J.S. App. 8a) that is higher than the average Democratic registration of District 12 as a whole (75%, see *id.* at 99a). In addition, including many of the "excluded" precincts would in many cases have made District 12's outside boundaries far more irregular. And one-person, one-vote principles, which place constraints on the total number of persons within a single congressional district, must be factored into the analysis. Although precincts may vary widely in population, the district court made no effort to calculate what alterations would have had to have been made in the district as a whole—and, in particular, whether District 12 would have retained its strong Democratic character—if it had been redrawn to include one or more of the "excluded" precincts.

the districts at issue in *Bush* had far less geographic coherence than District 12 in this case. Compare *id.* at 987-989 (maps of Texas districts in *Bush*) with J.S. App. 59a (map of District 12). The Court noted, however, that "[t]he Constitution does not mandate regularity of district shape, and the neglect of traditional districting criteria is merely necessary, not sufficient" to trigger strict scrutiny. 517 U.S. at 962 (citation omitted). Because Texas had introduced evidence that incumbency protection, as opposed to race, had been the basis for the neglect of traditional districting principles, the plurality proceeded to undertake a careful comparative inquiry into whether the asserted partisan concerns or race had been the predominant motive underlying the "bizarre" configuration of the challenged districts. See *id.* at 967-973 (Dallas area districts), 975-976 (Houston district). Notwithstanding the finding of a virtually total lack of geographic integrity, this further inquiry was necessary because, "[f]or strict scrutiny to apply, traditional districting criteria must be *subordinated to race*," not to other districting factors. *Id.* at 962. See also *id.* at 967 ("In some circumstances, incumbency protection might explain as well as, or better than, race a State's decision to depart from other traditional districting principles, such as compactness, in the drawing of bizarre district lines."). The district court disregarded *Bush* and erred in concluding that evidence regarding District 12's geography could refute the State's claim that that very geography was caused by politics, not race.

II. THE RECORD IN THIS CASE IS INSUFFICIENT TO SHOW THAT CLAIM PRECLUSION PRINCIPLES BARRED APPELLEES' CLAIM

A "final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981). At the remedial phase of the *Shaw* litigation, the three-judge court in that case offered the parties an opportunity to challenge the State's 1997 redistricting plan, including District 12. The *Shaw* plaintiffs chose not to assert any claim of unconstitutionality, asserting that they would not have standing to do so under this Court's decision in *United States* v. *Hays*, 515 U.S. 737 (1995), because they did not live in that district. The State has claimed that, based on the *Shaw* litigation, appellees' claims are barred by principles of res judicata.

1. We share the doubts of the *Shaw* district court that standing principles could have barred the successful *Shaw* plaintiffs from challenging the constitutional adequacy of the remedy in that case, J.S. App. 166a, and thus agree that the claims of the two appellees who were also plaintiffs in *Shaw* may well be precluded here. Four of the appellees in this case reside in District 12 and were not parties in *Shaw*. If the claims of those four appellees are not precluded, the question whether the claims of the two appellees who were parties in *Shaw* would be precluded is of little consequence.

2. The record in this case is insufficient to support a finding that the claims of the four non-*Shaw* appellees are barred because they were "virtually represented" in the *Shaw* case. See J.S. 17. We agree with the State

that the broad standing rule that frequently applies in districting litigation creates the potential for burdensome, successive litigation, as well as for manipulation of the system by plaintiffs to obtain a desired judge or panel. We also agree with the State that the "virtual representation" theory of preclusion has been widely recognized by the courts of appeals as a construction of the traditional concept of "privity." See, *e.g.*, *Gonzalez* v. *Banco Cent. Corp.*, 27 F.3d 751, 757 (1st Cir. 1994); cf. *Richards* v. *Jefferson County*, 517 U.S. 793, 798 (1996) (res judicata may apply "when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party"). In an appropriate case, where the factual record is more fully developed, the application of the "virtual representation" theory to redistricting litigation could be more fully explored. In this case, however, the factual record is insufficient to support the State's "virtual representation" argument.

The record in this case discloses only that the four non-*Shaw* appellees were all represented by the same attorney who represented the plaintiffs in *Shaw*, that the legal theories underlying their claims are similar to those of the plaintiffs in *Shaw*, and that two other persons who were plaintiffs in this case were also parties in *Shaw*. None of the various formulations of the "virtual representation" theory by the courts of appeals would bar claims based on those facts. Application of the "virtual representation" theory of preclusion depends on issues such as whether the parties in the earlier and later cases were under common control, see, *e.g.*, *Gonzalez*, 27 F.3d at 758-760; *Nordhorn* v. *Ladish Co.*, 9 F.3d 1402, 1405-1406 (9th Cir. 1993); whether they had a familial, see, *e.g.*, *Jaffree* v. *Wallace*, 837 F.3d 1461, 1467 (11th Cir. 1988), or other legal relationship that aligned their interests and gave them an identical incentive to litigate, see, *e.g.*, *Chase Manhattan Bank* v. *Celotex Corp.*, 56 F.3d 343, 345 (2d Cir. 1995); *Ahng* v. *Allsteel, Inc.*, 96 F.3d 1033, 1037 (7th Cir. 1996); whether the parties in the later litigation had manifested consent to be bound by the earlier case, see, *e.g.*, *Benson & Ford, Inc.* v. *Wanda Petroleum Co.*, 833 F.2d 1172, 1176 (5th Cir. 1987); and whether the parties in the later case had timely notice of the earlier one, see, *e.g.*, *Gonzalez*, 27 F.3d at 761 & n.10. No court has accepted the proposition that mere representation by a common counsel and assertion of a similar legal claim is sufficient to trigger claim preclusion against a nonparty. See, *e.g.*, *Gonzalez*, 27 F.3d at 759. Accordingly, the State's suggestion that the four new appellants were barred by res judicata principles should be rejected.

CONCLUSION

The Court should reverse the district court's grant of summary judgment to appellees.

Respectfully submitted.

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